[2020] IEHC 477

THE HIGH COURT
JUDICIAL REVIEW

[2020 No. 22 JR]

BETWEEN

SABRINA JOYCE KEMPER

APPLICANT

AND
AN BORD PLEANÁLA,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND
IRISH WATER DAC

NOTICE PARTY

JUDGMENT of Mr. Justice Allen delivered on the 23rd day of September, 2020

1. By notice of motion issued on 28th January, 2020 pursuant to an order of Simons J. made on 23rd January, 2020 the applicant gave notice of her intention to apply for leave to apply by way of judicial review for an order of *certiorari* quashing a decision by An Bord Pleanála made on 11th November, 2019 to grant permission to Irish Water for the development of the Greater Dublin Drainage Project. The proposed development is a strategic infrastructure project comprising a wastewater treatment plant, sludge hub centre, orbital sewer, regional biosolids storage facility and an outfall pipeline into the Irish sea, north-east of Ireland's eye.

2. The motion was closely case managed in the strategic infrastructure list and it was listed for hearing for ten days commencing on 7th July, 2020.

3. On the morning of the third day of the hearing Mr. Oisín Collins B.L., for the applicant, asked me to recuse myself on the ground that I had previously acted for Irish Water in a case of *Irish Water v. Woodstown Bay Shellfish Ltd.* [2017] IEHC 223. That development in that case, or at least the development subtending that case, was said to be very similar to the development the subject of the application before me. That case was said to have dealt with issues which were similar to those raised in the application before me, namely, environmental impact assessment and appropriate assessment issues. It was said that the decision of Baker J. referred to a lot of the cases which Mr. Collins intended to rely on and that that case might actually be useful in the case before me. There was, it was said, a potential issue of conflict of interest and the court was asked to recuse itself. One of the grounds on which the applicant was seeking to have the decision of An Bord Pleanála quashed was bias. The argument at that stage had not been developed, but broadly, part of the applicant's case was that the decision to grant permission was tainted by the alleged previous interest or involvement of two members of the Board in the project, and by an alleged failure on the part of those members to make declarations of interest.

4. The close similarity of the development which was the subject of *Irish Water v. Woodstown Bay Shellfish Ltd*. and the proposed development the subject of the application before me was said to be that they both involved a pipe into the sea. The

similar issues were said to be issues in the form of EIA and AA. The court, it was said, had not declared at the outset "*that it had a prior involvement in the case*" and so could not determine "*whether similar issues involving An Bord Pleanála are or are not in breach of the law*". The position was said to be untenable on first principles.

5. The respondents and the notice party having indicated that they would oppose the application, I invited Mr. Collins to justify it by reference to the authorities. He was not then in a position to do so and I put the case back overnight to allow him to do so.

6. Over the course of the following day the court was brought through all of the relevant authorities. While counsel were agreed that the applicable legal principles are well established, there was one difference as to what those principles are. Mr. Collins suggested that the threshold is lower in a case where the recusal application is made to the trial judge than in a case in which an appellate court is asked to set aside the judgment of a trial court on the grounds of objective bias.

7. Late in the afternoon of the fourth day I decided that I should not recuse myself. In an *ex tempore* ruling I gave an outline of my reasons and I then indicated that I would elaborate the reasons for my decision in my written judgment on the substantive application. In the meantime, the applicant has appealed against the refusal of her recusal application and I have taken the view that I should give this separate written judgment on that issue. This will allow the parties to be fully prepared when the appeal first comes into the directions list so that it can be heard as soon as the Court of Appeal can accommodate it: unless by then it has been rendered moot by the judgment on the substantive application which I will deliver as early as I can in the new term. If the appeal is not by then moot, it will be fairly urgent for the parties will need to know as soon as may be whether my judgment on the substantive application is to stand.

8. The *locus classicus* of the law of course is the judgment of Denham J., as she then was, in *Bula Ltd. v. Tara Mines Ltd.* (No. 6) [2000] 4 I.R. 412 in which one of the issues was the circumstances in which a judge who had previously, as a barrister, advised or acted for one of the parties should recuse himself. At p. 445 of the report Denham J. said: -

> *"In Ireland the test is objective. The test is a view of the reasonable person who would have a reasonable knowledge of a barrister's work and so the link or links alleged need to be more than simply that the judge, as barrister, acted for one of the parties to the action.*
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> *Indeed, it was quite rightly accepted by the applicants that the mere fact that a judge, when a practising barrister, acted for a party is not a bar to him or her acting as a judge in a subsequent case where that party is a party to the litigation. The test for the Court is more than a prior relationship of legal adviser and client."*

9. Ms. Justice Denham went on to refer to two Australian cases and in particular expressed agreement with the analysis of Merkel J. in *Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd*. (1996) 135 A.L.R. 753, where Merkel J. emphasised the need for a cogent and

rational link between the association of the judge with the party and its capacity to influence the decision to be made in a particular case.

10. On p. 446 of the report Denham J. observed that:

> *"A judge works on the basis of his or her legal training and the declaration made on being appointed as a judge."*

11. Having set out the declaration required by Article 34.5.1 of the Constitution of Ireland, 1937 Denham J. continued:-

> *"On occasion it is inappropriate for a judge to adjudicate in a case. This will depend on the circumstances. A judge is not disqualified from adjudicating in a case merely because one of the parties was in receipt of his or her professional legal services at an earlier time. In the context of the independent bar, which operates in Ireland, such a link is not a connection sufficient to disqualify. It requires special additional circumstances to disqualify a judge from adjudicating on a case.*
>
> *Thus, a long, recent and varied connection may disqualify a judge. The circumstances must be cogent and rational so as to give rise to a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the issues in the case. Special circumstances precluding a judge from presiding include a situation where the judge, as counsel, has previously given legal services to a party on issues alive in the case to be heard before a court."*

12. In support of his submission that a lower threshold applied in the case of a recusal application made to a judge than on an appeal, Mr. Collins relied on the judgment of Kelly J. (as he then was) in *Ryanair Ltd. v. Terravision London Finance Ltd*. [2011] 3 I.R. 192. In that case the plaintiff moved to have the judge recuse himself by reason of a comment made in a judgment in other proceedings in which the plaintiff had been plaintiff which was said to give rise to a reasonable apprehension of objective bias. Kelly J., at para. 28 of the judgment, approved of a statement made by the Court of Appeal in England in *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd*. [2000] Q.B. 451 where that court said:-

> *"If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance."*

13. Kelly J., applying to the evidence the yardstick of a reasonable and fair minded objective observer, who was not unduly sensitive, and who was in possession of all of the relevant facts, concluded that his statement in the previous case would not give rise to an apprehension that he would not be fair and impartial. At para. 63 he found that the case on objective bias failed.

14. At paragraph 64 of the judgment Kelly J. moved on to two other considerations which arose from *dicta* in *Locabail (U.K.) Ltd.* and a later judgment of the Court of Appeal in England in *Drury v. British Broadcasting Corporation* [2007] EWCA Civ. 605.

15. The first of those considerations, which Kelly J. accepted, was that:-

> *"…if there is 'real ground for doubt, that doubt should be resolved in favour of recusal'. If the objective observer would have a real ground for doubt, then the recusal should be granted, even in circumstances where the case for recusal does not meet the necessary standard of proof."*

16. On the facts, that did not arise.

17. The second consideration was that although a recusal application might fail, nevertheless if another judge could be found so that the case could proceed immediately, without increased cost or inconvenience to the parties, the court could and should arrange for a substitution to avoid any question of dissatisfaction or future complaint.

18. In *Ryanair Ltd. v Terravision London Finance Ltd.* the progress of the case, which had been admitted into the commercial list, had been delayed by the recusal motion. Kelly J. apprehended that if he continued to deal with the case Ryanair would appeal, which would give rise to further and very much more significant delay, which would not serve the interests of justice or of the defendant. In those circumstances, Kelly J., being at that time the commercial list judge, followed the course which had been adopted in *Drury v. British Broadcasting Corporation* and assigned another judge to deal with the case.

19. I do not understand *Ryanair Ltd. v. Terravision London Finance Ltd*., or the English authorities referred to in that case to support the argument that the test to be applied by a trial judge who is asked to recuse himself of herself (or who is independently of his or her own motion considering whether he or she should recuse himself or herself) is different to the test that is to be applied by an appellate court.

20. In *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.* the observations of the Court of Appeal were directed to the approach that should be taken by the trial judge to whom such an application might be made.

21. In *Drury v. British Broadcasting Corporation* the Court of Appeal was dealing with an application that a member of that court should recuse himself, which gave rise to the same considerations as would apply to an application to a first instance judge.

22. The judgment in *Drury* is a very short *ex tempore* ruling which variously suggests that it would have been appropriate for the court to have rejected the application, and that the court had collectively concluded that the better course was that the judge should recuse himself, and that the judge, individually, had done so. What is quite clear is that the recusal application had been made at the sitting of the court before the appeal started and that at some stage over the course of the morning a substitute judge had been

identified who could take up the case immediately after lunch, and that was what was done.

23. It strikes me that there may be a difference between a case in which, as Smith L.J. is reported as having said in *Drury,* "*there is any room for doubt as to which the right course was to adopt*" and a case in which, as the judgment in Locabail records, "*there is real ground to doubt*" but I understand the course taken in *Drury* to have been driven by pragmatism rather than principle. That is certainly the way in which Kelly J. understood it because at para. 68 of *Ryanair Ltd. v. Terravision London Finance Ltd* he said:-

> *"Thus, in Drury v. British Broadcasting Corporation [2007] EWCA Civ. 605, (Unreported, Court of Appeal, 14th May, 2007), the Court of Appeal, although it rejected the application to recuse on the merits and had no room for doubt in that regard, nonetheless substituted a judge for the judge originally assigned."*

24. Nor, in my view, does *Ryanair Ltd. v. Terravision London Finance Ltd*. support the argument that a judge should recuse himself if there is merely room for doubt or if an objective observer could conceivably have cause for doubt. I accept the submission of Mr. McGrath S.C., for Irish Water, that that proposition is not only unsupported by the authorities but runs counter to the authorities.

25. Mr. McGrath drew attention to two judgments which were approved by the Supreme Court in *Goode Concrete v. CRH plc* [2015] 3 I.R. 493. The first is judgment of Keane C.J. in *Rooney v. Minister for Agriculture* [2001] 2 I.L.R.M. 37 where he said:-

> *"Where one or other party does invite a judge to disqualify himself, the established and prudent practice has been for the judge concerned to disqualify himself if he has any reservations about the matter. On the other hand a judge cannot permit a scrupulous approach by him to be used to permit the parties to engage in forum shopping under the guise of challenging the partiality of the court."*

26. The second judgment which was cited with approval In *Goode Concrete* was a decision of the High Court of Australia in *Ebner v. Official Trustee* [2000] HCA 63, (2000) 176 A.L.R. 644 where it was said:-

> *"In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that would result if an appellate court were to take a different view of the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable."*

27. The test I must apply then, is whether the circumstances of my previous engagement as a barrister on behalf of Irish Water would, or reasonably could, give rise to a real doubt in the mind of a reasonable, fair minded, objective observer who has a reasonable

knowledge of a barrister's role and work, in possession of all the relevant facts, and who is not unduly sensitive, that the court would not hear the case with an open mind or could not deal with the application fairly and even handedly. Short of the applicant establishing a reasonable apprehension of objective bias, the threshold is met if the circumstances are such as to give rise to a real doubt.

28. The judgment of Baker J. in *Irish Water v. Woodstown Bay Shellfish Ltd*. [2017] IEHC 223 shows that the case in which I acted as counsel was an appeal to the High Court from a decision of the Circuit Court on an interlocutory motion taken in the course of statutory appeal by Irish Water to the Circuit Court pursuant to s. 97 of the Water Services Act, 2007 against a refusal by a landowner of permission to lay a pipe under the seabed in Youghal Harbour. Irish Water had obtained all of the necessary permissions, including planning permission, for the development of a main drainage scheme for Youghal, including permission to lay the pipe. The purpose of the proceedings before the Circuit Court was to determine the extent to which Irish Water, in the public interest, might be permitted to displace the private rights of the owner of the seabed. Central to that issue was the extent to which the laying of the pipe would disturb the seabed, specifically any mussel beds along the proposed route. Irish Water wanted the permission of the court to carry out an inspection of the seabed, including permission to take samples of mussels by running a small dredger about 40 cm wide along the seabed.

29. The difficulty, or what turned out to be the difficulty, for Irish Water was that the entirety of Youghal Bay was a European Site, comprising a special area of conservation ("*SAC*") and a special protection area ("*SPA*") and it had not put up any evidence of the likely impact of the proposed inspection on the site. Baker J. found that the Water Services Act, 2007 must be construed in a way which was compatible with Council Directive 92/43/EEC ("*the Habitats Directive*") and that the jurisdiction of the court to permit inspection of the site must be constrained by the fact that it was a European Site. Applying the decisions of the CJEU in *Sweetman v. An Bord Pleanála* Case (C-258/11) and *Waddenzee* (Case C-127/02) [2004] E.C.R. 1-7405 and of the High Court in *Kelly v. An Bord Pleanála* [2014] IEHC 400, Baker J. decided that the Circuit Court judge had correctly refused the motion to inspect in the absence of evidence of the impact, if any, of the proposed inspection on the site. The issue on which the case turned, then, was whether the court was required to carry out an EIA before permitting a potentially intrusive inspection of a European Site.

30. What is not evident from the judgment and could not have been known to the applicant when the recusal application was first made but must be taken to have been known to an objective observer in possession of all the facts (and which was made known at an early stage in the application) was that this was the only case in which I had acted for Irish Water and that the brief had come to me on the recommendation of a colleague rather than the nomination of Irish Water or the recommendation of its solicitors. A well informed reader of the judgment would have known that the appeal to the High Court would likely have been heard on the same affidavit evidence as had been put before the Circuit Court. An observer in possession of all the facts would have known that I had not

been briefed in either the substantive appeal to the Circuit Court, or the interlocutory application to the Circuit Court which was the subject of the appeal, and that by the time I was briefed the appeal had been listed for hearing.

31. The first proposition advanced in support of the recusal application was that the fact that I did not, before taking up the case, declare what was characterised, variously, as my "*prior involvement in the case*" and my "*prior professional relationship*" with Irish Water by itself gave rise to an apprehension of bias. I cannot accept that. It begs the question as to whether there was a rational and cogent link between the previous engagement and the case before me. It calls for the declaration of something which may be completely irrelevant and would preclude an examination of whether there is substance to an application made later. It is accepted by Mr. Collins that the fact that a judge may previously as a barrister have acted for a party is not a bar to him or her hearing a case. It is accepted that there is no obligation on a judge to recall or declare that while in practice he or she acted for one or other or all of the parties. The examples canvassed in argument were that a judge assigned to hear a planning case might previously have acted, perhaps frequently, for one or other or all of the parties in personal injuries or property litigation.

32. I have no difficulty with the proposition that before taking up a case a judge should declare any circumstances, including previous professional engagement, which might give rise to a cogent and rational apprehension that he or she might not be impartial. If the circumstances are such as, in the opinion of the judge, warrant it, it is the duty of a judge to recuse himself or herself. If the judge is in doubt as to whether he or she should recuse himself or herself, he or she should declare the circumstances and invite submissions. Having heard the parties, the judge must decide the question. If one of the parties raises such an issue, the judge will canvass the views of the other parties before deciding it. The mere fact that the judge himself or herself, or one of the parties, has raised the issue does not disqualify him or her from deciding it. It follows, it seems to me, that it does not matter when the issue is raised. The circumstances warranting recusal may be known before the case starts or they may emerge during the course of the trial, for example when a witness is called who is personally known to the judge and on whose credibility the decision will turn.

33. If the rule is, as it is, that the mere fact that a judge, as a barrister, has acted for a party is not an automatic disqualification, there can be no obligation on the part of the judge to declare that fact by itself. If the law is, as it is, that a party applying to a judge to recuse himself or herself must establish cogent and rational grounds for an apprehension of bias, the mere fact that a judge has not declared a prior professional engagement or relationship will not give rise to a reasonable apprehension.

34. The second argument is that the similarity of the proposed developments in Youghal and Dublin is such as to give rise to an apprehension of bias. Acknowledging that he had no idea as to the extent of my involvement in the case in Cork, Mr. Collins submitted that a reasonable bystander would conclude from the fact that counsel acted for Irish Water in

the Circuit Court appeal that the same counsel advised Irish Water on issues surrounding the laying of the pipe, the necessary environmental assessments, the standards and so on. I do not accept that. Counsel will very often – I venture to suggest usually – be briefed to defend a challenge to a decision made or to a course of action taken into which they had no input. It is not to be inferred from the fact that counsel is briefed to stand over a decision that the decision was made on counsel's advice, or even that counsel necessarily believes that the decision was correct, or arrived at correctly.

35. I do not accept the argument that the proposed development in Dublin and the proposed work the subject of the Youghal case are similar or would be thought to be similar by a reasonable, well informed, objective observer. It is true that the proposed development in Youghal involved a marine outfall, but that development was not directly the subject of the Circuit Court appeal. The judgment of Baker J. carefully distils the core issue, which was whether the court was required to make an assessment of the environmental impact of the proposed inspection. An objective observer in possession of all the facts would have known that I had no involvement with the development.

36. Even if an informed observer might have thought that senior counsel briefed to argue the Circuit Court appeal might, or probably would, have advised Irish Water on the environmental issues underlying that element of the case, the hypothesised advice would have been as to the necessity for the court to carry out an EIA before permitting the proposed dredging, not the laying of the pipe. If a well informed observer might have hypothesised that counsel had given advice, he or she could not know what that advice was. It is highly unlikely that the client would have told him or her, and certain that counsel would not have disclosed it. A well informed observer familiar with the vagaries of practice at the bar would not confidently infer from the fact that evidence was not available at a trial that it was not directed in counsel's advice on proofs.

37. I do not accept that there is any similarity in the legal issues in the Youghal case and those that arise in the case before me. A fair measure of that was, as Mr. McGrath pointed out, that *Irish Water v. Woodstown Bay Shellfish Ltd*. (which none of the counsel in the case had ever heard of) was nowhere mentioned in the 186 pages of written legal submissions and was not among the 76 cases in the nine folders of authorities. The fact that it was completely irrelevant to the case in hand was underlined by the fact that after I refused the recusal application and resumed hearing the motion it was not once referred to over the course of the following eight days.

38. Mr. Collins' hypothesis that an objective observer might conclude that a judge who had conducted a case as a barrister might have given advice developed into speculation as to what that advice might have been, and from there to whether the advice might have been at variance with the decision. The case in Cork for Irish Water was lost. It was submitted "*that it is reasonable that the applicant might have an apprehension that those advices having been given, might influence the approach taken by this court*". From here Mr. Collins moved into the middle of a passage from the judgment of the High Court in Australia *Re Polites; Ex parte Hoyts Corporation Pty*. (1991) 173 C.L.R. 78, at pp. 87 and

88, which was cited by Denham J. in *Bula Ltd. v. Tara Mines Ltd. (No. 6)* that if advice has gone beyond an exposition of the law to the adoption of a course of conduct to advance the client's interests, the erstwhile legal adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective, or was wise, reasonable or appropriate. But what the High Court of Australia was dealing with was a case in which the erstwhile legal adviser might be assigned to hear a case in which the quality of his or her advice was in issue. This is simply not such a case and could not reasonably be viewed as such a case.

39. Even if there was a similarity between the legal issues in the Cork case and the case now before me, that would not justify a recusal. A judge who as a barrister has conducted, say, a breach of contract case for a client is not thereby disqualified from hearing a breach of contract action in which the same party is involved, any more than a barrister who has been briefed once is necessarily precluded from later taking a brief in an action against his previous client. Routinely, counsel on the cab rank will be offered briefs for plaintiffs and defendants in cases in professional negligence actions in which the same indemnifier is involved. Over the course of time, or even in a single case, counsel may gain insight into the thinking or strategy of a client or an insurance company which would require that he or she should not thereafter accept a brief against that client or a party indemnified by the particular insurance company, and may carry that to the bench. But the particular circumstance or rational and cogent connection will be the insight rather that any commonality of the legal issues that might arise.

40. The third proposition is that the previous professional engagement gives rise to a reasonable apprehension of bias in addressing the issues raised by the applicant that the two members of An Bord Pleanála ought to have recused themselves. Ms. Butler S.C., for the Board, submits that this is a completely circular argument. I prefer to say that it does not get out of the blocks. As Ms. Butler puts it, the issues have to be decoupled. Either the circumstances are such as to warrant recusal, in which case the court cannot determine any of the issues in the case, or they do not, in which case there is no reason why the court cannot proceed to determine the objective bias issues in the case. What the argument boils down to is the proposition that once an allegation of objective bias on the part of the judge is raised, however insubstantial, the judge cannot be perceived as being impartial in his assessment of whether there is substance to the objection.

41. The issue of objective bias in the substantive application was said to be twofold: first the prior professional associations of the Board members and secondly a failure to make necessary declarations and disclosures. In the case of one of the Board members, Mr. Chris McGarry, the applicant's case is that he was disqualified by reason of his having previously been employed by a property developer with lands in north County Dublin that might benefit from the development of the Greater Dublin Drainage Scheme. In the case of the other, Mr. Dave Walsh, the applicant's case is that he was disqualified by reason of his involvement as a civil servant in the delivery of the National Planning Framework, of which the Greater Dublin Drainage Scheme was a component.

42. At the time I dealt with the recusal application I had not, of course, heard any submissions as to the legal principles to be applied in deciding the issue of objective bias on the part of a member of An Bord Pleanála, but even if those principles were the same as those which apply to a judge who has previously acted for a party to litigation, the circumstances of Mr. McGarry's professional association with his erstwhile employer and Mr. Walsh's previous professional association with the National Planning Framework are obviously and completely different to the previous professional association of the court with Irish Water. In the case of Messrs. McGarry and Walsh, the suggestion, in very broad terms, was that they might be perceived as having had an interest in the outcome of the planning application, but it was not suggested that the court could be perceived as having an interest in the outcome of the case.

43. A refusal of the recusal application would no more prejudge the issue as to whether Messrs. McGarry and Walsh were disqualified than a decision that I should recuse myself would have meant that they were disqualified and that the permission would have to be quashed.

44. The starting point is that it is the duty of a judge to sit to hear the case which has been assigned. If the circumstances are such as to give rise to a real risk of a reasonable apprehension of objective bias, the judge should recuse himself, or herself. If not, he or she must hear the case. The circumstances relied upon as disqualifying the judge from hearing a judicial review will almost always be different to those relied on as having disqualified the decision maker. I reject the argument that a correct application of the legal principles to a recusal application might, or might reasonably be thought to, contaminate or taint the application of the same principles to an issue of objective bias on the part of the decision maker.

45. It cannot be gainsaid that the recusal application had potentially serious consequences for the case. It had, as I have said, been closely case managed and given an early hearing date during a lockdown. It was at hearing remotely in one of the few courts equipped for such a hearing, which if the case had been reassigned would likely have been idle for two weeks. It was not a case that could have been assigned to another judge without inconvenience, delay or additional expense. To have abandoned the hearing after four days would have wasted four days costs and put the case back for a number of months but I would not have hesitated to do so if my recusal had been warranted.

46. Having decided that the applicant had not made out a case that I should recuse myself, I turned my mind to the argument that the case might nevertheless be assigned to another judge.

47. What prompted or persuaded Kelly J. in *Ryanair Ltd. v. Terravision London Finance Ltd*. to assign a colleague was the objective of the commercial list to facilitate the fair and expeditious resolution of commercial disputes, the fact that the progress of the case had been delayed by the recusal application, the desire of the defendant to have the case resolved, and the fact that the substitution could be made without adding to the cost or inconvenience. The desirability of achieving the fair and expeditious resolution of

disputes is not confined to commercial cases, or to such commercial cases as may be admitted into the commercial list, or to judicial review applications which have been assigned to the strategic infrastructure list, but it is fair to say, I think, that it applies a *fortiori* to such cases. In this case, as in that, an appeal was likely. But in that case, unlike this, a substitution could be made without additional cost or inconvenience.

48. This case, as I have said, was closely case managed and special arrangements were made to ensure that it would be heard during lockdown. At the time I decided the recusal application the case had been at hearing for four days. Four legal teams had expended a great deal of time and effort preparing for a ten day hearing. To have abandoned the hearing would have significantly increased the costs and delayed the case by however long it would have taken to identify another judge to take it up and assign a new hearing date in a courtroom equipped to accommodate a remote hearing. As to the costs, Mr. Collins' declared position is that the only person who can recover costs in this case is himself. If that is so – and I am not to be taken as saying that it is so – the substitution of another judge would have been at the expense of the respondents and notice party.

49. Absent good grounds for the recusal application, the respondents and the notice party were entitled to have the motion heard and they all indicated by counsel that that was what they wished.

50. In reaching my decision as to what was to be done for the best, I took into account the possibility that the Court of Appeal might take a different view of the recusal application. I am sure that the respondents and the notice party did too when they took the course they did.

51. In this case, the evident dissatisfaction and inevitable further complaint on the part of the applicant could only have been avoided at the expense of the respondents and the notice party. That would not have been a just outcome.